

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

BART STREET III, a Nebraska Limited )  
Liability Company, )  
 )  
Plaintiff, )  
vs. )  
 )  
ACC ENTERPRISES, LLC, a Nevada Limited )  
Liability Company; ACC INDUSTRIES, INC., )  
a Nevada corporation; CALVADA )  
PARTNERS, LLC, a Nevada Limited Liability )  
Company; )  
 )  
Defendants. )

Case No.: 2:17-cv-00083-GMN-VCF

**ORDER**

Pending before the Court is the Renewed Motion to Dismiss, (ECF No. 140), filed by Defendants ACC Enterprises, LLC (“ACC Enterprises”); ACC Industries, Inc. (“ACC Industries”); and Calvada Partners, LLC (“Calvada”) (collectively “Defendants”). Plaintiff Bart Street III (“Plaintiff”) filed a Response, (ECF No. 144), and Defendants filed a Reply, (ECF No. 146).

Also pending before the Court is Plaintiff’s Motion for Summary Judgment. (ECF No. 142). Defendants filed a Response, (ECF No. 148), and Plaintiff filed a Reply, (ECF No. 153).

For the reasons discussed herein, Defendants’ Renewed Motion to Dismiss is **GRANTED in part** and **DENIED in part**. Further, Plaintiff’s Motion for Summary Judgment is **DENIED as moot**.

**I. BACKGROUND**

This case arises from an alleged breach of a multi-million-dollar loan agreement. Plaintiff is in the business of money lending, and Defendants are allegedly the owners and operators of a cannabis cultivation plant in Pahrump, Nevada. (*See* Compl. ¶¶ 13–33, 5:21–13 n.15); (Am. Operating Agreement at 2, Ex. 4 to Compl., ECF No. 1-4) (stating that ACC

1 Industries was “previously engaged in” a “cannabis cultivation business in Pahrump, Nevada,”  
2 and ACC Enterprises “has succeeded to substantially all of the assets of . . . ACC Industries,  
3 Inc.”). On August 19, 2016, Defendants executed a promissory note agreement with Plaintiff,  
4 which involved a loan of \$3.5 million dollars (“First Promissory Note”). (Compl. ¶ 13). The  
5 parties soon after executed a second promissory note on September 6, 2016, for a loan of \$1.2  
6 million dollars (“Second Promissory Note”). (*Id.* ¶ 22). Defendants allegedly breached the  
7 terms of both promissory notes.

8       The First Promissory Note by Plaintiff was to ACC Industries and ACC Enterprises.  
9 (First Promissory Note at 2, Ex. 1 to Compl., ECF No. 1-1). This Note specified that Plaintiff  
10 would loan roughly \$3.5 million dollars to ACC Industries and ACC Enterprises conditioned  
11 upon the funds being used in the following ways: (1) \$725,000 as operating capital; (2) \$25,000  
12 to Plaintiff as due diligence costs; (3) \$2.2 million to Beverly Pacific, LLC, as payment of a  
13 prior loan of ACC Industries and ACC Enterprises; (4) \$275,000 to Insight Media, LLC; and  
14 (5) \$275,000 to Hill Health, Inc. (Compl. ¶ 14); (First Promissory Note at 2, Ex. 1 to Compl.).  
15 Additionally, this Note had an interest rate of 7% per annum as well as a “right of first refusal  
16 to obtain fully paid and non-assessable units or shares<sup>1</sup> in [ACC Industries] or [ACC  
17 Enterprises].” (Compl. ¶ 21); (First Promissory Note at 2, 4, Ex. 1 to Compl.). The Note  
18 provided that all interest and the outstanding principal was due by September 1, 2017, after  
19 which ACC Enterprises and ACC Industries would be in default and Plaintiff could accelerate  
20 all owed principal amounts and interest to make it “immediately due and payable.” (Compl.  
21 ¶ 18).

22       The Second Promissory Note of \$1.2 million dollars was to all Defendants in this case,  
23 and it similarly included restrictions on how Defendants could use the funds. (*Id.* ¶¶ 22–30);  
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25 <sup>1</sup> Plaintiff’s Complaint does not clearly define the term “non-assessable units or shares”; however, exhibits  
attached to and referenced in Plaintiff’s Complaint define the term as “membership interests” or “ownership  
interests” in Defendants’ business. (Compl. at 6:18–23 n.18; Am. Operating Agreement at 8, Ex. to Compl.).

1 (Second Promissory Note at 2; Ex. 2 to Compl., ECF No. 1-2). That is, the Note required  
2 Defendants to use the money to purchase two parcels of land in Nye County, Nevada—  
3 \$500,000 to acquire land parcel #040-041-35; and \$700,000 to acquire land parcel #040-041-  
4 34. (Compl. ¶ 22); (Second Promissory Note at 2, Ex. 2 to Compl.). Just as the First  
5 Promissory Note provided, the Second Promissory Note gave Plaintiff a “right of first refusal to  
6 obtain fully paid and non-assessable units or shares in ACC Industries or ACC Enterprises.”  
7 (Compl. ¶ 29); (Second Promissory Note at 4, Ex. 2 to Compl.). The Second Promissory Note  
8 further stated that all interest and outstanding principal was due by September 1, 2017, after  
9 which Defendants would be in default and Plaintiff could accelerate all owed principal and  
10 interest to be “immediately due and payable.” (Compl. ¶¶ 24–27).

11 Plaintiff alleges that shortly after the execution of the Second Promissory Note,  
12 Defendants took actions inconsistent with the requirements of both Promissory Notes.  
13 Specifically, on October 24, 2016, ACC Enterprises and ACC Industries filed an Amended  
14 Operating Agreement that “restructure[ed], revised or amended [ACC Enterprise’s] governing  
15 documents, issued new membership units, and transferred, sold, or assigned all or a portion of  
16 ACC’s equity and assets.” (*Id.* ¶¶ 31–32); (*see* Am. Operating Agreement at 2, 15–27, Ex. 4 to  
17 Compl.). The purpose of this Amended Operating Agreement was for ACC Enterprises to  
18 merge or acquire ACC Industries. (Compl. ¶ 33). Additionally, Defendants entered into a  
19 Membership Interest Purchase Agreement (“Purchase Agreement”) with Vert Holdings, LLC  
20 (“Vert Holdings”). (*Id.* ¶ 32); (Membership Agreement at 2, Ex. 3 to Compl., ECF No. 1-3).  
21 The Purchase Agreement identified Vert Holdings as the predecessor in interest to Beverly  
22 Pacific, LLC. (Compl. ¶ 34). Additionally, the Purchase Agreement allegedly converted  
23 Defendants’ loan from Beverly Pacific, LLC, into equity in ACC Enterprises and gave Vert  
24 Holdings fully paid and non-assessable units in ACC Enterprises. (*Id.*).

1 Plaintiff contends that Defendants neither used the funds from the First Promissory Note  
2 to pay off Beverly Pacific, LLC's loan as required nor used the funds from the Second  
3 Promissory Note to purchase land parcel #040-041-34. (*Id.* ¶¶ 34–37). Plaintiff further states  
4 that even though the Purchase Agreement offered ownership shares in Defendants' business,  
5 Plaintiff did not receive any prior notice or opportunity to express its rights of first refusal  
6 under either Promissory Note. (*Id.*). According to Plaintiff, Defendants gave Vert Holdings the  
7 right of first refusal for any new units issued by ACC Enterprises, while also giving control  
8 over actions and decisions by ACC Enterprises to Vert Holdings. (*Id.* ¶¶ 34–36).

9 On December 23, 2016, Plaintiff provided Defendants with written notice that they were  
10 in default under the First and Second Promissory Notes. (*Id.* ¶ 38). Defendants subsequently  
11 refused to repay the Promissory Notes. (*Id.*).

12 Because of Defendants' alleged breach of the Promissory Notes and refusal to repay the  
13 principal and interest owed, Plaintiff initiated this suit on January 10, 2017, alleging six causes  
14 of action against Defendants: (1) breach of contract for the First Promissory Note against ACC  
15 Enterprises and ACC Industries; (2) breach of contract for the Second Promissory Note against  
16 all Defendants; (3) breach of the implied covenant of good faith and fair dealing regarding the  
17 First Promissory Note against ACC Enterprises and ACC Industries.; (4) breach of the implied  
18 covenant of good faith and fair dealing regarding the Second Promissory Note against all  
19 Defendants; (5) unjust Enrichment as to the First Promissory Note against ACC Enterprises and  
20 ACC Industries; (6) unjust enrichment as to the Second Promissory Note against all  
21 Defendants. (*Id.* ¶¶ 40–56). Defendants filed the instant Renewed Motion to Dismiss on  
22 October 26, 2017, (ECF No. 140).

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## 1     **II.     LEGAL STANDARD**

### 2             **A.     Motion to Dismiss**

3             Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action  
4     that fails to state a claim upon which relief can be granted. *See N. Star Int’l v. Ariz. Corp.*  
5     *Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule  
6     12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not  
7     give the defendant fair notice of a legally cognizable claim and the grounds on which it rests.  
8     *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the  
9     complaint is sufficient to state a claim, the Court will take all material allegations as true and  
10    construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792  
11    F.2d 896, 898 (9th Cir. 1986).

12            The Court, however, is not required to accept as true allegations that are merely  
13    conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*  
14    *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action  
15    with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a  
16    violation is *plausible*, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing  
17    *Twombly*, 550 U.S. at 555).

18            A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure 41(b)  
19    for failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San Bernardino*  
20    *Police Dept.*, 530 F.3d 1124, 1129 (9th Cir.2008). Rule 8(a)(2) requires that a plaintiff’s  
21    complaint contain “a short and plain statement of the claim showing that the pleader is entitled  
22    to relief.” Fed. R. Civ. P. 8(a)(2).

23            “Generally, a district court may not consider any material beyond the pleadings in ruling  
24    on a Rule 12(b)(6) motion . . . . However, material which is properly submitted as part of the  
25    complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard*

1 *Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly,  
2 “documents whose contents are alleged in a complaint and whose authenticity no party  
3 questions, but which are not physically attached to the pleading, may be considered in ruling on  
4 a Rule 12(b)(6) motion to dismiss” without converting the motion to dismiss into a motion for  
5 summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule  
6 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*  
7 *Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers  
8 materials outside the pleadings, the motion to dismiss is converted into a motion for summary  
9 judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

10 If the court grants a motion to dismiss, it must then decide whether to grant leave to  
11 amend. The court should “freely give” leave to amend when there is no “undue delay, bad  
12 faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by  
13 virtue of . . . the amendment, [or] futility of the amendment . . .” Fed. R. Civ. P. 15(a); *Foman*  
14 *v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear  
15 that the deficiencies of the complaint cannot be cured by amendment. *See DeSoto v. Yellow*  
16 *Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

### 17 **III. DISCUSSION**

18 Defendants move to dismiss Plaintiff’s Complaint on several grounds. First, Defendants  
19 argue that Plaintiff cannot state a claim for the enforcement of the Promissory Notes because it  
20 would require the Court to enforce an illegal contract for the “operation and expansion of a  
21 marijuana business.” (Am. Mot. to Dismiss (“MTD”) 12:22–13:22, ECF No. 140). Second,  
22 Defendants argue that the Court should dismiss this action under either the abstention doctrine  
23 articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976),  
24 or in *Burford v. Sun Oil. Co.*, 319 U.S. 315 (1943). (*Id.* 13:24–18:15). Last, according to  
25 Defendants, Plaintiff failed to include an indispensable party whose joinder would destroy the

1 Court’s subject matter jurisdiction over this case. (*Id.* 18:18–24:13). The below discussion  
2 addresses each argument in turn.

### 3       **A.     Illegality**

4       Defendants’ theory behind the unenforceability of the Promissory Notes rests on the fact  
5 that possession and cultivation of cannabis is unlawful under federal law because of the  
6 Controlled Substances Act, 21 U.S.C. § 801 *et seq.* (*Id.* 13:2–7). Defendants argue that even  
7 though the Promissory Notes in this case relate to legal activities such as providing “operating  
8 capital” or funds to pay off Defendants’ prior business loans, the Notes are effectively tied to  
9 advancing Defendants’ cannabis cultivation business; thus promoting acts that violate the  
10 Controlled Substances Act. (*Id.*). Defendants further argue that the First and Second  
11 Promissory Notes are components of a \$9-million-dollar agreement that would convert the  
12 Promissory Notes into equity in Defendants’ cannabis business. (*Id.* 16:22–17:5).  
13 Consequently, according to Defendants, the Court cannot enforce the Promissory notes at all  
14 since they relate to ownership in an operation that is illegal under federal law. (*Id.*) In  
15 response, Plaintiff notes that the Promissory Notes only require the legal act of loan repayment  
16 with “United States currency.” (Resp. to MTD (“Resp.”) 11:1–2, ECF No. 144). Similarly,  
17 under Plaintiff’s view, no provision of the Promissory Notes “obligated the defendants to  
18 perform any acts illegal” in the forum where performance was to take place (here, Nevada). (*Id.*  
19 13:1–8). Even if any part of the Promissory Notes did require illegal activity, Plaintiff  
20 continues, the Court can strike that illegal portion and enforce the legal aspects of the  
21 Promissory Notes. (*Id.* 13:9–11).

22       The first step to decide whether illegality renders a contract unenforceable rests on  
23 choice-of-law principles. *See Bassidji v. Goe*, 413 F.3d 928, 935 (9th Cir. 2005) (“While we  
24 recognize that federal law governs whether the transaction . . . was illegal, the enforceability of  
25 the illegal guarantees under general principles of contract law is a separate question.”). The

1 guiding principle is that federal courts sitting in diversity should apply the applicable state  
2 substantive law so long as enforcement does not mandate illegal conduct under federal law.  
3 *Bassidji*, 413 F.3d at 936, 939 (“[W]ith regard to the enforcement of ‘illegal’ contracts, courts  
4 will not order a party to a contract to perform an act that is in direct violation of a positive law  
5 directive.”). In other words, a court only needs to dismiss a claim if the lone remedy available  
6 would be illegal under either federal or state law. *See id.*

7 Here, Nevada law supplies the applicable substantive law. The parties were to perform  
8 the contract in Nevada, and the Promissory Notes state that they “shall be governed by and  
9 construed under the laws of the State of Nevada.” (First Promissory Note at 4, Ex. 1 to Compl.,  
10 ECF No. 1-1); (Second Promissory Note at 3, Ex. 2 to Compl., ECF No. 1-2). *See Progressive*  
11 *Gulf Ins. Co. v. Faehnrich*, 327 P.3d 1061, 1064 (Nev. 2014) (“Nevada’s choice-of-law  
12 principles permit parties ‘within broad limits to choose the law that will determine the validity  
13 and effect of their contract.’”) (citations omitted).

14 Under Nevada law, “contracts made in contravention of the law do not create a right of  
15 action.” *Vincent v. Santa Cruz*, 647 P.2d 379, 381 (Nev. 1982). Stated differently, Nevada law  
16 strips the ability to sue for breach of contract if the underlying contract is for an illegal act. *See*  
17 *id.*; *Loomis v. Lange Fin. Corp.*, 865 P.2d 1161, 1165 (Nev. 1993) (“No court should be  
18 required to serve as paymaster of the wages of crime.”).

19 Nevertheless, a finding of illegality is not fatal to every contract under Nevada law.  
20 Instead, when some portions of a contract are illegal, but not all, Nevada law allows courts to  
21 sever the illegal portions from those that are legal, and then enforce the legal portions. *Vincent*,  
22 647 P.2d at 381. The ability to sever only applies, however, when the illegal portions are  
23 “collateral to the main transaction” and “the language employed and the subject-matter of the  
24 contract” shows that severability will preserve the parties’ intent in making the contract.  
25 *Vincent*, 647 P.2d at 381 (quoting *Golberg v. Sanglier*, 616 P.2d 1239 (Wash. Ct. App. 1980);



1 *Linebarger v. Devine*, 214 P. 532, 534 (Nev. 1923); *Cox v. Station Casinos, LLC*, No. 2:14-cv-  
2 638-JCM-VCF, 2014 WL 3747605, at \*4 (D. Nev. June 25, 2014), report and recommendation  
3 adopted, No. 2:14-cv-638 JCM VCF, 2014 WL 3778241 (D. Nev. July 21, 2014) (“Severability  
4 preserves the contracting parties’ intent by maintaining the existence of a contract but striking  
5 illegal provisions that are collateral to the contract’s primary purpose.”).

6 As an example of severability, in *Vincent v. Santa Cruz* four individuals entered into a  
7 valid purchase agreement for land. 647 P.2d at 380. Several months later, however, the parties  
8 to the purchase agreement added a clause that violated Nevada law on recording property sales,  
9 which made the overall agreement unlawful. *Id.* at 380–81. Nevertheless, the Nevada Supreme  
10 Court still found the purchase agreement enforceable by severing the unlawful addition from  
11 the overall legal purchase agreement. *Id.* at 381. Severance was appropriate because the  
12 remaining purchase agreement aligned with the parties’ overall intent to enter into a land sale  
13 agreement—shown by the fact that the parties inserted the illegal portion *after* they executed  
14 the purchase agreement. *Id.* Further, the illegal portion was merely collateral to the overall  
15 contract, and thus severable, because it focused on the relatively minor act of recording the sale  
16 compared to the overall land purchase. *Id.* Accordingly, the once illegal agreement could still  
17 be enforced by the Nevada court, albeit in part.

18 Applying Nevada law to this case, the Court finds that it can provide a remedy for  
19 Plaintiff that both complies with Nevada substantive law and does not conflict with federal law.  
20 This finding comes from the fact that several requirements of the First and Second Promissory  
21 Notes command the Defendants to use the loaned funds for solely legal acts. The First  
22 Promissory Note, for example, requires Defendants to use certain funds to pay off Defendants’  
23 prior lenders. (First Promissory Note at 2, Ex. 1 to Compl.). Similarly, the Second Promissory  
24 Note requires Defendants to use all the funds to purchase two parcels of land in Pahrump,  
25 Nevada. (Second Promissory Note at 2, Ex. 2 to Compl.). Because of the explicit directives,

1 enforcing those terms of the Promissory Notes as shown in the Complaint does not mandate  
2 any action that would violate the Controlled Substances Act under federal law; nor does it  
3 provide any discretion to Defendants that would enable them to use the funds for the cultivation  
4 or possession of cannabis.

5 At the same time, the Court recognizes that the Complaint's allegations and attached  
6 exhibits illustrate Defendants' involvement in a cannabis cultivation business. Specifically,  
7 around the time Plaintiff executed the Promissory Notes with Defendants, Plaintiff alleges ACC  
8 Enterprises merged or acquired Defendant ACC Industries to "operate a cannabis cultivation  
9 business in Pahrump, Nevada." (Compl. ¶ 33, 5:21–13 n.15); (Am. Operating Agreement at 2,  
10 Ex. 4 to Compl., ECF No. 1-4). Further, prior to that business transformation, Defendant ACC  
11 Industries, who was a named party in the First and Second Promissory Notes, was "previously  
12 engaged" in the cannabis cultivation business. (Compl. ¶ 33, 5:21–13 n.15); (Am. Operating  
13 Agreement at 2, Ex. 4 to Compl.). Therefore, from the face of the Complaint it stands to reason  
14 that Plaintiff executed the Promissory Notes with knowledge of Defendants actions in a  
15 federally unlawful cannabis business. This means that the Court cannot order any remedy that  
16 permits Defendants to directly use Plaintiff's funds for cannabis cultivation or to gain  
17 ownership in Defendant's cannabis business. Doing so would provide relief in contravention of  
18 federal law under the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* In terms of the  
19 Promissory Notes here, that would mean that the Court cannot enforce the provisions of both  
20 Promissory Notes that give Plaintiff the "right of first refusal" for an ownership interest in  
21 Defendants' business; nor can the Court enforce the provision under the First Promissory Note  
22 that provides funds for Defendants to use as "operating capital" to cultivate cannabis. (First  
23 Promissory Note at 2, 4; Ex. 1 to Compl.); (Second Promissory Note 4, Ex. 2 to Compl.).

24 In finding portions of the Promissory Notes to be unenforceable, the Court does not need  
25 to dismiss Plaintiff's Complaint in its entirety. Indeed, because Nevada law allows a Court to

1 sever illegal portions of a contract from those that are legal, the Court could enforce only the  
2 legal provisions discussed *supra*. Whether severance should apply in this case, however, is a  
3 question to be decided through evidence that such action would be in line with the parties'  
4 intent in contracting and that the unenforceable provisions are collateral to the overall  
5 agreement—evidence that the Court does not have at this stage in the case.<sup>2</sup> Accordingly,  
6 insofar as the Court finds that some aspects of the contract are enforceable, Plaintiff has stated a  
7 cognizable claim for relief, thereby avoiding dismissal. *See Johnson v. Riverside Healthcare*  
8 *Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008) (citations omitted).

9 In finding limited enforceability of the Promissory Notes, the Court is persuaded by  
10 other courts within the Ninth Circuit that have similarly dealt with this issue. For example, in  
11 *Mann v. Gullickson*, No. 15-CV-03630-MEJ, 2016 WL 6473215 (N.D. Cal. Nov. 2, 2016), the  
12 federal district court in California had to decide whether it could enforce a contract even though  
13 it related to the sale and cultivation of marijuana. There, one party contracted with another to  
14 sell two businesses: a “consulting business for state-regulated marijuana dispensary or  
15 cultivation licenses; and a “franchise hydroponic operation.” *See Mann*, 2016 WL 6473215, at  
16 \*1. Following the sale, the buyer had to pay the seller with \$400,000 in three installments,  
17 which did not occur. *Id.* The seller then brought a breach of contract claim against the buyer;  
18 and the buyer moved to dismiss arguing that enforcement of the contract would “mandate  
19 illegal conduct” because the buyer had “no other means by which to pay [the seller] other than  
20 with revenue from [cultivating marijuana].” *Id.* at 2.

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23 <sup>2</sup> Defendants’ contention that the Promissory Notes are one part of a larger \$9-million-dollar deal for equity in  
24 Defendants’ business, (see MTD 16:18–17:5), does not change the Court’s analysis. Nevada law on severance  
25 would still allow the Court to potentially fashion relief so that only certain parts of the Promissory Notes could  
be enforceable—portions unrelated to payment for ownership. *See Vincent*, 647 P.2d at 381. Thus, whether the  
Promissory Notes are part of a larger deal will only impact the application of severability in this case, not the  
result of dismissal at this time.

1           Ultimately, the court in *Mann* decided that the claims should not be dismissed. Though  
2 the court recognized the illegality of marijuana under federal law, the court found that ordering  
3 payment on the contract would not require any illegal conduct. *See id.* at 8 (“[I]f the Court  
4 ordered payment, and [the buyer’s] only way to pay was by making these businesses  
5 operational, that situation would not necessarily require [the buyer] to be involved in the  
6 medical marijuana industry; [the buyer] has not shown otherwise.”).

7           Here, just as in *Mann v. Gullickson*, the potential remedy in this case discussed *supra*  
8 would not mandate illegal activity. Accordingly, the Court declines to dismiss Plaintiff’s  
9 claims relating to breach of contract on illegality grounds at this stage.<sup>3</sup>

10           **B.     *Colorado River* Abstention**

11           Defendants argue that even if the Court finds Plaintiff’s Complaint to be viable, it should  
12 still be dismissed “pursuant to the *Colorado River* doctrine” because there was a nearly  
13 identical case in Nevada state court involving the parties here, and Nevada state courts are  
14 better suited to handle the issues in this case. (MTD 13:24–17:17); (Reply at 5:2–6:1, ECF No.  
15 146). The *Colorado River* abstention doctrine applies when a case in federal court is identical  
16 to a concurrently pending state court case. *Colo. River Water Conservation Dist. v. United*  
17 *States*, 424 U.S. 800, 813 (1976). This abstention doctrine applies in “exceptional  
18 circumstances,” which Courts determine by evaluating several factors. *See id.* at 818–19.

19           In this case, the Court does not need to balance any factors to find that *Colorado River*  
20 does not apply. Moreover, the previously pending Nevada state court case is now in federal  
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22           <sup>3</sup> Defendants’ argument for dismissal on illegality grounds in the Renewed Motion to Dismiss, (ECF No. 140),  
23 only addresses Plaintiff’s breach of contract claims; it does not discuss the viability of Plaintiff’s claims for  
24 Unjust Enrichment or Breach of the Implied Covenant of Good Faith and Fair Dealing, (Compl. ¶¶ 48–56). In  
25 Defendants’ Reply, (ECF No. 146), however, Defendants appear to introduce for the first time an argument that  
“Plaintiff’s equitable claims are also barred by the unclean hands doctrine.” (Reply 1:19–29, 4:1–2).  
Nevertheless, the Court declines to address that argument in this Order because Plaintiff has not had an adequate  
opportunity to respond. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (“The district court need not  
consider arguments raised for the first time in a reply brief”).

1 court as *ACC Industries, Inc., et al. v. Bart Street III, LLC, et al.*, 2:17-cv-00942-JAD-CWH.  
2 *Colorado River* abstention is therefore inapplicable. *Sexton v. NDEX W., LLC*, 713 F.3d 533,  
3 538 (9th Cir. 2013) (stating that *Colorado River* abstention is reserved to cases where state  
4 proceedings are “pending concurrently” with federal proceedings); see *Miller v. Wholesale Am.*  
5 *Mortg., Inc.*, No. 12-CV-03481-JST, 2013 WL 1209492, at \*2 (N.D. Cal. Mar. 25, 2013)  
6 (“[T]here is no currently pending state court action with which this Court might interfere.  
7 Defendants removed this case from state court in May, and the *Colorado River* doctrine does  
8 not apply.”).

### 9 **C. *Burford* Abstention**

10 In addition to Defendant’s *Colorado River* abstention argument, Defendants also invoke  
11 the abstention doctrine under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), to argue that the  
12 Court should dismiss this case. (MTD 17:22, 18:9–15). Defendants argument is that federal  
13 review would frustrate the difficult matters of state law and policy at issue in this case, thereby  
14 warranting the Court’s abstention out of “federalism and comity.” (*Id.* 17:22, 18:9–15).  
15 Plaintiff counters Defendants’ argument by stating that this case does not involve complicated  
16 issues of federal review because “this is a straightforward breach of contract case;” and that this  
17 case is one for monetary damages, which means that under *Quackenbush v. Allstate Ins. Co.*,  
18 517 U.S. 706 (1996), the Court cannot dismiss the case under the *Burford* doctrine.

19 *Burford* abstention is “designed to limit federal interference with the development of  
20 state policy,” and it is justified where the issues in federal court “are primarily questions  
21 regarding that state’s laws.” *Tucker v. First Maryland Sav. & Loan, Inc.*, 942 F.2d 1401, 1407  
22 (9th Cir. 1991). Application of *Burford* abstention generally requires that “the state has chosen  
23 to concentrate suits . . . in a particular court; that federal issues could not be separated easily  
24 from complex state law issues with respect to which state courts might have special  
25 competence; and that federal review might disrupt state efforts to establish a coherent policy.”

1 *Knudsen Corp. v. Nevada State Dairy Comm’n*, 676 F.2d 374, 377 (9th Cir. 1982).  
2 Nonetheless, “[w]hile *Burford* is concerned with protecting complex state administrative  
3 processes from undue federal interference, it does not require abstention whenever there exists  
4 such a process, or even in all cases where there is a ‘potential for conflict’ with state regulatory  
5 law or policy.” See *Tucker*, 942 F.2d at 1405 (citing *New Orleans Pub. Serv., Inc. v. Council of*  
6 *City of New Orleans*, 491 U.S. 350, 362 (1989)).

7 Here, this case does not warrant dismissal under *Burford*. First, the Court is unaware  
8 of—and Defendants do not provide—any facts or law that show Nevada chose to concentrate  
9 breach of contract actions regarding cannabis businesses in a particular court. See, e.g., *Lao v.*  
10 *Wickes Furniture Co.*, 455 F. Supp. 2d 1045, 1057 (C.D. Cal. 2006) (citing *Communications*  
11 *Telesystems Int’l v. California Public Utility Com’n*, 196 F.3d 1011, 1020 (9th Cir. 1999), for  
12 the principle that “courts typically place the burden of establishing . . . an abstention doctrine  
13 on the party opposing the exercise of federal jurisdiction.”). Second, this case does not present  
14 issues that state courts might have special competence. That is, though cannabis sales may be  
15 complex and unique to Nevada, breach of contract claims regarding the lending of money to  
16 businesses are not. Finally, the chance that the Court’s decision could disrupt Nevada’s efforts  
17 to establish a coherent policy on cannabis does not weigh toward abstention because the present  
18 issues here focus on the enforceability of contracts under *federal* law, thus extending beyond  
19 Nevada and remaining appropriate for federal review. See *New Orleans Pub. Serv., Inc. v.*  
20 *Council of New Orleans*, 491 U.S. 350, 362 (1989) (explaining how *Burford* abstention is  
21 appropriate if it would not “disrupt the State’s attempt to ensure uniformity in the treatment of  
22 an ‘essentially local problem’”). Accordingly, the Court declines to abstain.

#### 23 **D. Indispensable Party**

24 Defendants last argument for this Court to dismiss Plaintiff’s Complaint focuses on  
25 Plaintiff’s alleged failure to join an indispensable party. Defendants argue that Plaintiff failed

1 to include Solutionary-NV in this case, who Defendants allege was involved in the subsequent  
2 modifications of the Promissory Notes from loans to equity in Defendants' business. (*See Decl.*  
3 of Howard Misle ¶ 13, Ex. 1 to MTD, ECF No. 140-1) (stating that "[b]ased on . . .  
4 representations and statements by [a principal of Plaintiff's], Defendants were informed and  
5 believed that . . . Solutionary . . . was acting . . . as a party in the negotiations"). Defendants  
6 contend that Solutionary-NV's involvement is evinced by the fact that a principal of Plaintiff  
7 used the email address "steveidelman@solutionary.com" in several emails about the loan  
8 modification. (*Id.* ¶ 12). Defendants argue that without Solutionary-NV in the case, they would  
9 be unable to pursue any potential mandatory counterclaims. (MTD 23:3–6).

10 In response, Plaintiff argues that "it is factually and legally impossible for Defendants to  
11 have entered into a [c]ontract with Solutionary" because Solutionary-NV dissolved as a  
12 corporation in December 2012—four years before the parties met in 2016. (Resp. 16:8–16).  
13 Plaintiff additionally contends that any claims against Solutionary-NV are time-barred under  
14 Nevada's statute of limitations for claims against dissolved corporations, Nev. Rev. Stat. §  
15 78.585(1). (*Id.* 17:6–18:19). Last, Plaintiff argues that Solutionary-NV does not meet the  
16 requirements to be an indispensable party. (*Id.* 18:21–20:17).

17 To determine whether a party is "indispensable" under Federal Rule of Civil Procedure  
18 19, courts take a two-step approach. First, the court must determine whether the absent party is  
19 "necessary" to the case. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). If the  
20 party is "necessary," the court must then determine whether that party is "indispensable" so that  
21 "in equity and good conscience" the suit should be dismissed. *Id.*

22 Whether a party is "necessary" under the first step depends on two findings: (1)  
23 "complete relief" is not possible among those already parties to the suit; and (2) the absent  
24 party has a "legally protected" interest in the suit. *Id.* If the court finds that a party is not  
25

1 “necessary,” then the court does not need to consider the second step under Rule 19, and the  
2 case may continue without the absent party. *Id.* at 559.

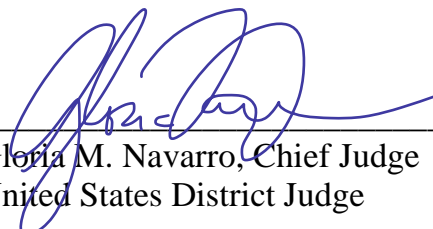
3 Here, Defendants’ argument supporting Solutionary-NV as an indispensable party  
4 concerns Solutionary-NV’s involvement in the “subsequent oral modification” to the  
5 Promissory Notes, wherein Plaintiff and Defendants allegedly converted the Promissory Notes  
6 into equity in Defendants’ cannabis business. (MTD 20:26 n.7). As stated previously, however,  
7 the Court cannot enforce any contract between the parties that would require relief in the form  
8 of ownership interest in Defendants’ cannabis business. Consequently, because Solutionary-  
9 NV’s asserted interest in this case is limited to unenforceable portions of the alleged contract,  
10 Solutionary-NV is not needed for the Court to award complete relief among the parties to this  
11 case. Accordingly, the Court declines to dismiss Plaintiff’s Complaint even though  
12 Solutionary-NV is not a named party.

#### 13 **IV. CONCLUSION**

14 **IT IS HEREBY ORDERED** that Defendants’ Renewed Motion to Dismiss, (ECF No.  
15 140), is **GRANTED in part** and **DENIED in part**. Plaintiff’s first and second causes of action  
16 for breach of contract are **dismissed with prejudice** insofar as they seek relief for Defendants’  
17 alleged breach of the right of first refusal in the First and Second Promissory Notes and  
18 Defendants’ alleged failure to repay Plaintiff’s loan for “Operating Capital” in the First  
19 Promissory Note.

20 **IT IS FURTHER ORDERED** that Plaintiff’s Motion for Summary Judgment, (ECF  
21 No. 142), is **DENIED as moot**.

22 **DATED** this 27 day of September, 2018.

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24  
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Gloria M. Navarro, Chief Judge  
United States District Judge